Case No.14945

THE FAMILY HEALTH SERVICE APPEALS AUTHORITY

Hearing: 13th March 2009

Mr D Pratt – Chair
Dr P Garcha – Professional Member
Mrs S Brougham – Member

BETWEEN:

DR MUNISWAMIAH SUBRAMANYAM
(GMC registration number 1305397)

Appellant

-and-

SOUTHAMPTON CITY PRIMARY CARE TRUST

Respondent

DECISION and REASONS

The Appeal

1. This is an appeal by Dr Muniswamiah Subramanyam ("Dr Subramanyam") against the decision of Southampton City Primary Care Trust ("the PCT"), given in its letter dated 13 October 2008, to remove him from its Performers' List ("the List"), pursuant to Regulation 10 (6) of the NHS Performers List Regulations 2004 ("the Regulations") on the ground that he had not demonstrated that he had performed services in the PCT's area in the last 12 months.
2. The appeal was opposed by the PCT which indicated by a letter dated 17 November 2008 that it relied on the grounds set out in the decision letter, and was content for the matter to be considered on the papers. The PCT did not respond to further written submissions by Dr Subramanyam nor did it appear at the hearing of this appeal.

Decision

3. The unanimous decision of the Panel is that this appeal be dismissed and that Dr Subramanyam be removed from the Performers List of this PCT pursuant to Regulation 10 (6) of the 2004 Regulations, as amended.

Preliminary matters and Directions

4. The appeal was listed for hearing on 10 February 2009. However by a letter dated 6 February and faxed to the FHSAA on 7 February (a Saturday), Dr Subramanyam asked for an adjournment to "a later date in the month of March" on the ground that his wife had recently been discharged from hospital after serious illness and he was required to look after her at home because of some functional disability from which she continued to suffer. He expressed the hope that by the date of the proposed adjournment, his wife would have improved sufficiently to enable him to leave her on her own and attend a hearing. It was not possible to consider that application before the FHSAA office opened on Monday 9 February. Dr Subramanyam faxed a further letter dated 9 February informing the FHSAA that he was represented by Mr Martin Harvey, Senior Industrial Relations Officer of the BMA, to whom all future correspondence should be directed. Mr Harvey emailed separately to request an adjournment. Dr Subramanyam attached a "to whom it may concern" letter of the previous day from his wife's GP informing us of the nature of the condition which had caused her admission to hospital in November 2008 and that since December 2008 her continuous care needs had been provided by Dr Subramanyam. It contained no prognosis or indication of when, if at all, Mrs Subramanyam might recover sufficiently to enable her carer to leave her for several hours to enable him to attend a hearing.
5. At short notice the PCT was asked for its response, which was provided by email. It expressed sympathy with Dr Subramanyam's position but deferred to the Panel for its decision whether to adjourn. We were unable to consider the request for an adjournment until the date of the proposed hearing, when we decided to adjourn to 13 March 2009. We also issued some Directions for the production of certain documents (by no later than 6 March 2009):
    (a) The summary and Personal Development Plan, created following his last appraisal as a General Practitioner;
    (b) A written summary of the steps he has undertaken to carry out the Personal Development Plan;

(c) *A written summary of any General Practice work he has undertaken since the date of the decision of the PCT taken in October 2008 which is now under appeal, bearing in mind that by virtue of Regulation 10 (14) of the Performers List Regulations 2004, the Appellant remains on the Performers List and can undertake work until this appeal is determined;*

(d) *Copies of any testimonials on which the Appellant wishes to rely.*

We also specified what further documentary evidence should be submitted in support of any further application to adjourn. We refer to our Order of 10 February 2009.

6. By an email sent on 6 March 2009 his BMA representative made a further application for an adjournment on the ground that Dr Subramanyam was the sole carer for his unwell wife and was unable get away. No period for the adjournment was suggested. Attached to the email was a further letter from his (and his wife's) GP stating that he was Mrs Subramanyam's principal carer, and that she needed "continuous care ongoing". No assistance was provided to enable us to determine if Mrs Subramanyam would make a sufficient recovery to enable her husband to leave her for a limited period, and if so, when. The PCT's views were canvassed and it responded in similar terms as before, but did not consent to a further adjournment. By an Order of 9 March 2009 we dismissed the application.
7. On 9 March 2009 Dr Subramanyam sent some, but not all of the further documents sought by the directions, and renewed his application to adjourn to an unspecified later date. We agreed to receive this late-served evidence.
8. On 13 March 2009 the Panel convened the hearing and first considered Dr Subramanyam's renewed application to adjourn. The evidence in support of his application remained substantially the same. He gave no estimate of when, if ever, his wife might improve sufficiently to enable him to leave her for a few hours. Despite having now provided two GP letters there was no prognosis offered. There is no suggestion that his wife's condition is life-threatening. It is suggested it is difficult for her to do things, without help, which require using her arms or walking. Dr Subramanyam did not address the question why it was not possible to obtain respite care or make alternative care arrangements for his wife, so as to enable him to attend a hearing for the

inside of a day. We were not satisfied, in these circumstances, that his own attendance was impossible. Neither letter suggested that his own health affected his ability to attend.

9. In any event, on the evidence available to us, there was no reason to suppose that a further adjournment would put Dr Subramanyam in any better position to attend the hearing. We could not identify any date within an acceptable time frame for further adjournment.

10. Among other things we considered the question of fairness to both parties, and whether proceeding would involve a denial of justice to Dr Subramanyam. We also kept in mind the public interest in the expeditious determination of appeals and the need to have regard to the use of resources. The appeal was lodged over four months ago, and this was the second application for adjournment, made on the same grounds, at a late stage when convening a hearing could not be avoided. We also took into account the factors set out at paragraphs 13 and 14 below when we came to decide the related question of whether to proceed in Dr Subramanyam's absence.

11. In our judgement, Dr Subramanyam's further application to adjourn this appeal should be dismissed.

12. We next considered whether the appeal should in any event proceed in his absence. Rule 40 (1) of the Family Health Services Appeal Authority (Procedure) Rules 2001 ("the Rules") provides that:

    "*If a party fails to attend or be represented at a hearing of which he has been duly notified, the panel may –*

    (a) unless it is satisfied that there is a reasonable excuse for such absence, hear and determine the appeal ….. in the party's absence; or

    (b) adjourn the hearing."

13. The exercise of our discretion under Rule 40 (1) is at large. Recognising that this question was intimately connected with that of adjournment, we also considered the matters the factors set out at paragraphs 8 to 10 above. In addition we took into account that whatever might be Dr Subramanyam's

reasons for non-attendance, he was represented on the record, and his representative was aware of this hearing date, but had not attended to present the arguments on his behalf. Had he done so, Dr Subramanyam's case could have been presented perfectly well, on the facts of this case, and Rule 40 would not have come into play. We did in fact cause a telephone call to be made to the offices of the BMA before convening this hearing, and were informed that a member of staff said that Mr Harvey knew of the hearing, but was not in the office, and was not contactable by mobile telephone. The BMA employee could offer no further information. No step had been taken by the BMA representative to inform the FHSAA that he would or would not be attending the hearing, notwithstanding the correspondence to which he was a party, identifying him as Dr Subramanyam's representative. This lack of normal professional courtesy caused some waste of time and uncertainty.

14. In considering the exercise of our discretion under Rule 40 (1) we also took into account the relatively narrow issue in this appeal, the fact that the essential facts were not in dispute, and did not therefore require witness evidence for their determination, and that Dr Subramanyam had been given every opportunity to produce documentary evidence and submissions as to his keeping up-to-date with his skills and knowledge, his personal development plan, summary of his last assessment and testimonial evidence. No challenge was made to the documents he had in fact produced.
15. In our judgement there was no reasonable excuse for the absence of both Dr Subramanyam and his representative and it was appropriate, fair and proportionate to proceed in his absence.

Reasons for the decision to dismiss the appeal

16. We next considered the substantive issues on the appeal. The relevant provision of the Regulations is Regulation 10 (6):

"*Where the performer cannot demonstrate that he has performed the services, which those included in the relevant performers list perform, within the area of the [PCT] during the preceding twelve months, it may remove him from its performers list.*"

The regulation confers an absolute discretion on the PCT to remove. This appeal proceeds by way of a redetermination and we can make any decision or exercise any power vested in the PCT.

17. We considered all the matters which had been placed before us, but in exercising our discretion, the principle factor is the nature and reasonableness of the excuse or reason for not performing services during the preceding 12 months. In most cases the fact of non-performance may be a sufficient reason for removal in itself. It is always open to a practitioner to re-apply for admission to the list of this or any other PCT. However there may be cases where the reason for non-performance or the particular merits or value which the practitioner can demonstrate would flow from his or her continued inclusion in the List, may cause the discretion to be exercised in his or her favour. We therefore considered the material which had been placed before us by Dr Subramanyam as how he had kept his skills and knowledge up to date, having regard to his age and the period of time he had been out of practice.
18. The following are the facts found by us and are taken from the documents provided by Dr Subramanyam. He is (now) a 71 year old doctor, who practised in the UK as a principal in a GP practice from 1975 to 31 March 2003, when he retired. Thereafter he worked as a locum GP. In addition he worked as a Clinical Assistant in the Accident and Emergency Department at Southampton General Hospital since 1974. He continued to work for one afternoon a week in the A & E Department after his retirement until November 2008.
19. Dr Subramanyam performed some locum work as a GP until March 2007, when he stopped on the advice of his accountant “for tax reasons”. This was the last time he performed work in a GMS setting. In May 2008 the PCT’s Head of Primary Care gave Dr Subramanyam an extension of 3 months on the Performers’ List, notwithstanding his failure to perform any services in the area during the previous 12 months. It is not disputed that Dr Subramanyam had not provided services within this PCT’s area of the kind those included in

the List perform for more than 12 months prior to the decision of the PCT to remove him. His case is that he did not realise that this exposed him to the risk of removal from the List under Regulation 10 (6), that he now appreciated its existence and if allowed to remain on the List, would not allow a further "lapse" to occur.

20. His letter of appeal also indicated in general terms that since his retirement Dr Subramanyam had kept up to date by regularly attending educational conferences and lectures and reading medical journals, and by his regular sessions in the A & E Department where he said he saw a wide variety of presenting conditions. He had also been regularly appraised by the PCT every year from 2005 until and including March 2008. Our Directions attempted to secure documentary proof and more detail of his current levels of proficiency and updating of skills and knowledge.
21. We were disappointed to note, therefore, that there were no testimonials (for example from senior colleagues with whom he had worked until November 2008 in the A & E Department). There was no recognisable Personal Development Plan although Dr Subramanyam did send copy notes made by his appraiser in March 2008. It was difficult to spell much out of these. He did not provide any evidence of having carried out any steps of a Personal Development Plan. We considered carefully the documentary evidence of skills maintenance. These were:

    16 April 2008 Royal college Physicians "New Perspectives on Management of Type 2 Diabetes (4 CPD units)

    22 May 2008 Pri-Med Update (content unspecified) 6 hours

    9 Oct 2008 Merck Sharp and Dohme "New and current treatment options for Type 2 Diabetes"

    13 Nov 2008 Pri-Med update (content unspecified) 6 hours

    10 March 2009 Pri-Med Online: "Coffee Break Learning: Overview of CKD Management"

    Even if supplemented by some reading of the BMJ, in our view the nature and number of these sessions was inadequate to keep up the skills and

knowledge of a medical practitioner who has not performed any GP work since March 2007, a period now of two years.

22. We also noted that even when he was granted an extension on the List of 3 months in May 2008, Dr Subramanyam registered with a locum agency but the copy emails he himself provided showed that he had failed to return the registration pack until prompted to do so on 28 July, and because of his tardy response he was notified on 30 July that the sessions had been taken by another agency. This does not indicate commitment to take advantage of the opportunity he had been given.
23. However it is considered, Dr Subramanyam consciously and voluntarily stopped performing services in the PCT's area or indeed any GP services. Ignorance of the consequences is not in itself an acceptable reason for avoiding those consequences.
24. In all the circumstances we conclude that Dr Subramanyam has provided no reasonable excuse for his failure to perform services. Further, in our judgement, having regard to the length of time since he last performed services as a GP, he has failed to satisfy us that his skills and knowledge have been appropriately kept up to date. In our judgement there are no other good reasons for permitting him to remain on the List, or to treat him more favourably than other practitioners who have been removed for failure to show they have performed services over the previous 12 months. We reminded ourselves that it is always open to him to apply to be re-admitted to a PCT Performers List and consider that removal in the current circumstances is a proportionate decision. We dismiss the appeal and direct his removal from the Performers List.

Duncan Pratt (Chair of Panel) 3 April 2009